UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 03-33-B-W
	)	
WILLIAM LELAND,	)	
	)	
Defendant	)	

ORDER ON MOTION FOR HEARING AND RECOMMENDED DECISION ON MOTION TO SUPPRESS

Defendant William Leland ("Leland") has moved to suppress all evidence and observations obtained during a traffic stop of his Crown Victoria on April 5, 2003, and additional evidence obtained pursuant to a search of that vehicle on April 7, 2003, conducted pursuant to a search warrant following a two-day impoundment. (Docket No. 43). Leland's primary contentions are that certain statements attributed to him were the product of unwarned custodial interrogation and that drugs allegedly found in the vehicle should be suppressed based on a lack of probable cause to seize the vehicle without a warrant. Leland requests an evidentiary hearing on his motion. (Docket No. 54). The government opposes both motions. (Docket Nos. 50, 59.) I **DENY** Leland's request for a hearing and recommend that the Court **DENY** his motion to suppress with respect to all of the evidence discussed therein except for a statement allegedly made in one of the officer's cruisers shortly after the commencement of the traffic stop. As to that one statement, I recommend that the Court **GRANT** the motion to suppress.

Proposed Statement of Facts

The following statement is drawn from the affidavits of two state troopers who were present at the scene of the traffic stop, Trooper Christopher Carr and Trooper William Baker, and an agent of the Maine Drug Enforcement Agency ("MDEA"), Agent James Carr, who was also involved in the stop. (See affidavits attached to Docket No. 50.) Additionally, both the AUSA and the defendant's attorney have made some representations in their various pleadings that permit certain conclusions to be drawn. The Court also has before it the affidavit of Brian Tully filed in support of the original complaint (Docket No. 1) and the testimony presented at the preliminary detention hearing held before me on April 11, 2003. There is also the affidavit of Brian Tully filed in support of the search warrant I issued on April 5, 2003, authorizing the search of the Crown Victoria motor vehicle. Finally, Leland's counsel has submitted his own affidavit based upon information and belief.

On Saturday, April 5, 2003, MDEA Special Agent Brian Tully alerted Maine State Police and other law enforcement agents to be on the lookout for a blue Ford Crown Victoria that resembled a Maine State Police cruiser. The officers were informed that William Leland was returning from a trip to California in the Crown Victoria, where, according to two confidential informants,[1] he had traveled for the purpose of obtaining a significant quantity (several pounds) of the drug methamphetamine. They were also informed that Leland's wife, Ganessa Leland, and one Francis Hatch, a supposed Hell's Angels prospect, were traveling with Leland. Later that morning, the Crown Victoria was observed and stopped by Maine State Police Troopers Chris Carr and William Baker, each driving a separate cruiser. MDEA Special Agent James

[1] According to Agent Tully, both informants had a proven track record of supplying reliable tips to law enforcement. Moreover, that Leland actually traveled to California was corroborated by a cell phone pen register obtained by Agent Tully, which indicated activity on Leland's cell phone in California during his March road trip.

Carr arrived at the traffic stop in a third police vehicle at or around the time that Troopers Baker and Carr approached the Crown Victoria.

According to Trooper Carr, he and Baker conducted a "high-risk traffic stop" because Leland was known to be affiliated with the Hell's Angels motorcycle club and because the windows on the vehicle were darkly tinted and difficult to see through. After ordering all of the vehicle's three occupants out of the vehicle with guns drawn and at the ready, Trooper Carr handcuffed Leland, patted him down, and placed him in Special Agent James Carr's police vehicle. Meanwhile, Trooper Baker handcuffed Mr. Hatch. Agent James Carr ordered Leland's wife to exit the vehicle but did not handcuff her. He then took Mrs. Leland to his vehicle. Both the government and Leland agree that the Lelands were placed in Agent Carr's vehicle due to the inclement weather, not to forcibly restrict their movement. Both parties' initial filings are also in agreement that the handcuffs were removed from Leland at that time.

Although not indicated in any of the officers' affidavits, the Government indicates in its response to the motion to suppress that a verbal exchange occurred between one or more officers and Leland immediately after the handcuffs were removed, during which Leland allegedly stated that the "feds" must have been listening to his cell phone because he stated during a call that the "stuff," meaning methamphetamine, was "everywhere out here," meaning California. In his motion to suppress, Leland does not present any facts suggestive of a custodial interrogation. However, in his motion for an evidentiary hearing, filed seven weeks later, Leland's counsel avers, upon information and belief, that Leland was not only removed from the vehicle at gunpoint, handcuffed and subjected to abusive language, but also subjected to "suggestive statements" that the officers "were going to find drugs in the vehicle and that his story would change when they found the drugs in the vehicle." (Aff. of Christopher Largay, Docket No. 56, ¶

3.) According to Leland's counsel, this exchange transpired at a time when Leland was still handcuffed. (Id.)

Sometime after placing Leland in Agent Carr's vehicle, Trooper Carr was preparing to have "Daro," a trained narcotic detection canine, perform a drug sniff test on the stopped vehicle. It is uncontested that Trooper Carr is trained and certified in the handling of narcotic detection canines. According to Trooper Carr, Daro immediately alerted to the presence of drugs in the vehicle while positioned at its front, near the grille, before being instructed to sniff out drugs. Trooper Carr thereafter pulled Daro from the vehicle and recommenced the sniff test by instructing Daro to find drugs. According to Trooper Carr, Daro again went to the front of the vehicle and alerted. According to both Trooper Carr and Agent Carr, Leland contended at the scene that Daro had not alerted on the car and he offered the officers an opportunity to search the vehicle. In his motion to suppress, Leland failed to provide any evidence, such as an affidavit, to either confirm or deny this fact.[2] Subsequently, in connection with his request for a hearing, Leland has presented his counsel's conclusory averment, on information and belief, that "[w]hen Trooper Carr took out his dog to sniff the vehicle, it did not hit upon the front of the vehicle or anywhere else." (Id.)

After the sniff test, the officers conferred and informed Leland that they were going to impound the vehicle until a search warrant could be obtained and that the vehicle would be towed to another location due to the weather conditions. Neither Leland nor his fellow travelers were arrested, but given that they would have been stranded on a rural interstate highway in a snowstorm, Agent Carr transported Leland, Ganessa Leland and Hatch to a garage in Newport,

[2] To be entitled to an evidentiary hearing on a motion, "the defendant must allege facts, 'sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented,'" United States v. Lewis, 40 F.3d 1325, 1332 (1st Cir. 1994) (quoting Cohen v. United States, 378 F.2d 751, 761 (9th Cir.), cert. denied, 389 U.S. 897 (1967)), "facts that, if proven, would entitle him to relief." Id.

Maine, where they were free to go. According to Agent Carr, Mr. Hatch used the agent's cell phone to contact someone to pick them up in Newport. At or around the same time, the impounded vehicle was transported to the garage. According to Trooper Carr and Agent Carr, while en route to Newport, Leland requested that they be permitted to retrieve some personal items from the vehicle before meeting their ride. This was permitted, subject to a search of any items removed from the vehicle. Thereafter, Trooper Carr asked Leland whether he had everything he needed from the vehicle and, according to Trooper Carr, Leland responded, "It doesn't matter, I'm going to jail for the rest of my life anyway."

Based on the foregoing information (other than that related in the affidavit of Leland's counsel), on April 5, 2003, I issued a warrant to search the subject vehicle. According to the warrant return, in the course of a search conducted on April 7, 2003, officers discovered 800 grams of methamphetamine hidden in the vehicle's spare tire, located in the trunk. Based on this reported discovery, sworn to by Special Agent Brian Tully, I executed another search warrant on April 7, 2003, authorizing Agent Tully and any authorized officer of the United States to search the premises identified as Leland's residence. According to this warrant's return, various items were seized during the search, none of which is individually addressed in the motion to suppress.

Discussion

In his motion, Leland seeks to suppress three items of evidence: (1) the drugs; (2) the statement allegedly made in Agent Carr's cruiser; and (3) the statement allegedly made at the garage in Newport. Leland argues broadly that all three items should be suppressed as fruit of an illegal traffic stop because the officers did not have articulable suspicion to conduct the traffic stop. With regard to both of the alleged statements, Leland suggests that they were also the product of un-Mirandized, custodial interrogations. With regard to the drugs allegedly found in

the spare tire and the alleged statement made at the garage in Newport, Leland argues that they must both be suppressed because probable cause did not exist to support the extended seizure of the Crown Victoria. Finally, Leland argues that probable cause was lacking to support the search warrant. As has already been related, Leland has requested an evidentiary hearing on his motion and has submitted his counsel's affidavit in support of the request. That affidavit seeks to generate evidentiary disputes by means of certain averments made on "information and belief." The government objects to this proffer on basic evidentiary grounds, citing United States v. Lewis, 40 F.3d 1325, 1332 (1st Cir. 1994), and argues that the Court should deny the requested evidentiary hearing and summarily deny the motion to suppress. My assessment is that the parties' papers do not justify holding an evidentiary hearing on any factual issue because no factual disputes have been developed in this record. I further conclude that the Court should grant the motion to suppress with respect to the alleged statement in Agent Carr's cruiser, and deny the motion as to the latter statement and the drugs, as explained.

1. Leland's challenge does not allege any facts capable of supporting a finding that the officers lacked reasonable suspicion to conduct the traffic stop.

Leland argues that the initial stop was not supported by a reasonable, articulable suspicion of criminal activity because the information provided by the confidential informants was stale and inaccurate: stale because an informant indicated in January 2003 that Leland was going to travel to California, but Leland did not travel to California until March 2003; inaccurate because one of the informants indicated that Leland would be returning with several pounds of methamphetamine when, in fact, police now report finding less than two pounds of methamphetamine in the vehicle. (Mot. to Suppress, Docket No. 43, at 3-4.) Leland does not otherwise challenge the informants' reliability. These arguments should not detain the Court long. The reasonable suspicion standard asks whether an officer could articulate "a minimal

level of objective justification" for believing that criminal activity was transpiring. United States v. Golab, 325 F.3d 63, 66 (1st Cir. 2003). Although an officer must have more than a mere hunch, reasonable suspicion to conduct an investigatory stop need not rise to the level of probable cause to arrest. Id. Based on the information provided by the informants that Leland would be traveling to California to obtain a large quantity of methamphetamine, the fact that he did travel to California shortly thereafter, and the suspect manner in which the subject vehicle was detailed to look like a police cruiser, it would seem rather derelict of an officer not to conduct an investigatory stop. The timeliness concern does nothing to detract from this conclusion. A round trip by car from Maine to California is not exactly an everyday affair and given the nature of the endeavor a delay of several weeks hardly seems surprising, particularly a delay that permits travel in late March rather than January. Unlike a tip about a suspect's present possession or sale of contraband, this tip did not provide information of a kind that would very quickly become stale. Ultimately, in my view, the fact that Leland traveled to California within two months of the tip tends to be corroborative of the tip. Given the nature of a cross country road trip in winter, this information was sufficiently current to help support a reasonable suspicion that the vehicle would be returning from California with a quantity of methamphetamine. United States v. Schaefer, 87 F.3d 562, 568 (1st Cir. 1996) ("[C]ourts confronting suppression motions do not measure the timeliness of collected information mechanistically, merely counting the number of days elapsed. . . . . Rather, a number of integers must be factored into the calculus—e.g., the nature of the information, the nature and characteristics of the supposed criminal activity, the nature and characteristics of the place to be searched, the nature of the items delineated in the warrant—and the likely endurance of the information must be gauged on that basis."). Leland's second argument that the tip was

unreliable because police report finding less than several pounds of methamphetamine does not warrant serious comment. If anything were to be deduced from the discovery of 1.8 pounds of methamphetamine, it would be that the informants provided good information, not bad. But the governing standard does not permit the Court to justify an officer's suspicion based merely on the success of his investigation, nor could it. If the reasonableness of an investigation really turned on the results of the investigation, then the Fourth and Fourteenth Amendments would provide no security at all in this context. Byars v. United States, 273 U.S. 28, 29 (1927) ("A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and [such a] doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system . . . .").

Because Leland has not alleged any facts that would call the reliability of the informants into question or any particularized facts that would support his staleness theory, he is not entitled to an evidentiary hearing. Because the initial traffic stop was supported by reasonable suspicion, it was not a violation of Leland's Fourth Amendment right to be secure against unreasonable seizures.

2. The incidents of the high-risk traffic stop did not render the stop an unreasonable seizure or "de facto arrest."

Leland argues that the officers violated his Fourth Amendment rights by brandishing their fire arms and handcuffing him at the beginning of the stop. He would like to present evidence to the Court that Trooper Carr's manner in affecting the arrest was abrasive and involved the use of foul language. The Supreme Court has made it plain that investigatory stops need not be "confined to . . . momentary, on-the-street detention accompanied by a frisk for weapons." Michigan v. Summers, 452 U.S. 692, 700 (1981). The fact that several officers were present, that weapons were brandished, that Leland was briefly handcuffed, and that he was placed in

Agent Carr's vehicle does not require a finding that he was subjected to an unreasonable seizure. United States v. Quinn, 815 F.2d 153, 156-57 & n.2 (1st Cir. 1987). Terry stops may be forcible affairs under certain circumstances and the initial show of force in this case was reasonable given the nature of the drug trafficking suspicion, the concern over Hell's Angels affiliation, the dark tinted windows and the need to ensure officer safety. Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'") (rephrasing Camara v. Municipal Court, 387 U.S. 523, 536-537 (1967)); United States v. Stanfield, 109 F.3d 976, 981 (4th Cir. 1997) ("When, during already dangerous traffic stops, officers must approach vehicles whose occupants and interiors are blocked from view by tinted windows, the potential harm to which the officers are exposed increases exponentially, to the point, we believe, of unconscionability. Indeed, we can conceive of almost nothing more dangerous to a law enforcement officer in the context of a traffic stop than approaching an automobile whose passenger compartment is entirely hidden from the officer's view by darkly tinted windows."); United States v. White, 648 F.2d 29, 34-35 (D.C. Cir. 1981) ("Courts have generally upheld stops made at gunpoint when the threat of force has been viewed as reasonably necessary for the protection of the officer."). If, as Leland contends, one of the officers told him during the high-risk stop that it was the officer's "fucking highway" and that he would stop whomever he pleased, that would do nothing to change the result. Leland himself acknowledges that he wore the handcuffs only briefly and that the reason he remained in Agent Carr's vehicle after being removed from the Crown Victoria was because of the weather. In light of the officers' reasonable concerns in approaching this vehicle and its occupants, the initial "high-risk" attributes of the traffic stop did not transform the investigatory stop into a de facto arrest.

3. The government does not present any facts demonstrating that Leland made an incriminating statement in Agent Carr's vehicle, let alone that the alleged statement was voluntary.

According to the government, there is absolutely no need to conduct an evidentiary hearing on Leland's motion to suppress. It argues that the evidence presented in the officers' affidavits would not be contested by Leland in any material fashion even if a hearing were conducted and that the affidavits make it plain that no custodial interrogation occurred. (Gov't Resp. to Def.'s Mot. Evid. Hr'g on Mot. to Suppress, Docket No. 59, at 4, 6-7.) Leland asserts, however, that:

> Interrogation . . . did occur while he was handcuffed in Special Agent Carr's vehicle. While he was placed in the vehicle, law enforcement agents made suggestive statements to [him] that they were going to find drugs in the vehicle and that his story would change when they found the drugs in the vehicle.

(Aff. of Christopher Largay, Docket No. 56, ¶ 3.) Although I am inclined to agree that there is no need for an evidentiary hearing on this aspect of the motion, it is due to the fact that the officers' affidavits, standing alone, do not carry the government's burden of showing that the alleged statement was not the product of a coercive environment. When a defendant asserts that a confession was obtained in violation of Miranda, the government bears the burden to prove by a preponderance of the evidence, in a nut shell, that the defendant's confession was voluntary. Colorado v. Connelly, 479 U.S. 157, 168-169 (1972) ("Whenever the state bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our Miranda doctrine, the state need prove waiver only by a preponderance of the evidence."); United States v. Jackson, 918 F.2d 236, 241 (1st Cir. 1990). What the government has set forth is simply this: that three officers in three police cruisers conducted a "high-risk traffic stop," extracted Leland from his vehicle at gun point, handcuffed him, told him he was not under arrest, placed him in an unmarked cruiser and removed the handcuffs. Nowhere in the affidavits of the

several officers is it stated that Leland made any statement of the kind now alleged, not even in those affidavits filed in connection with the motion to suppress. Nor has the government offered any statement concerning the precise circumstances under which the alleged statement was given. In my view, the Court cannot properly find that a statement was voluntarily made when it cannot find in the available affidavits (the only record material of evidentiary quality at this juncture) that the statement at issue was even made. This is perturbing in light of the government's position that the Court should determine the issue (one for which the government bears the burden of proof) exclusively on the basis of the government's showing, which is silent on the matter. Because the government's presentation does not permit the Court to determine whether the statement was made or whether the "high-risk" nature of the traffic stop was, although justified, manipulated to obtain an incriminating statement,[3] and because the government has essentially indicated that it does not intend to make any showing in this regard, I recommend that the Court suppress the alleged statement about "the feds" bugging Leland's cell phone and about "the stuff" being "everywhere out here."

4. Leland does not allege any facts capable of supporting a finding that he was subjected to a custodial interrogation while at the garage in Newport.

According to the affidavit of Trooper Carr, Leland lamented, while in the presence of Trooper Carr at the garage in Newport, that it did not matter whether he had everything he needed from the Crown Victoria because he would be spending the rest of his life in prison.

[3] Although circumstances may reasonably permit officers to employ a highly coercive show of force at the commencement of a Terry stop to ensure their safety, it would be contrary to the Fifth Amendment for officers to take advantage of that atmosphere to obtain incriminating statements. For purposes of custodial interrogation, a defendant is in "custody" when his or her freedom of movement is restricted to a degree associated with a formal arrest, United States v. Ventura, 85 F.3d 708, 712 (1st Cir. 1996), whether or not a formal arrest has occurred, and a Terry stop is a form of seizure during which a suspect is not free to leave, Terry, 392 U.S. at 16. Conceivably, if the officers made statements designed to elicit a response during the "high-risk" portion of the traffic stop, then Leland might have been subjected to an unwarned custodial interrogation or even a coercive interrogation. See Berkermer v. McCarty, 468 U.S. 420, 437 (1984) (holding that "an ordinary traffic stop" will not give rise to any Miranda concerns as a matter of law but not speaking to high-risk traffic stops where guns and handcuffs are employed) (emphasis added).

Leland argues that this alleged statement must be suppressed because it would have been an unwarned statement made in the context of custodial interrogation. (Docket No. 43 at 5-6.) Although he may well dispute whether he made this statement, Leland has not alleged any facts or circumstances that would permit the Court to find that such statement was the product of a custodial interrogation. It appears well beyond question that a reasonable person in Leland's shoes would have considered himself able to leave the officers' presence at that point in the encounter. Therefore, I deny the request for an evidentiary hearing on this aspect of the motion to suppress. If there is any basis for suppressing this information, it would be the argument that it was tainted by an unlawful seizure of the Crown Victoria without a warrant and without probable cause, the next topic of discussion.

5. Leland does not allege any facts capable of supporting a finding that probable cause did not exist to seize the Crown Victoria pending the issuance of a search warrant.

Leland argues that all evidence obtained subsequent to the impoundment of the Crown Victoria must be suppressed, including the evidence obtained after the search warrants were issued, because it is all fruit of an unreasonable, warrantless seizure of the Crown Victoria. (Docket No. 43 at 4-6.) I have already concluded that the decision to stop the Crown Victoria was supported by reasonable suspicion and, therefore, lawful. Thus, the only[4] remaining question is whether the extended, warrantless seizure of the Crown Victoria was supported by probable cause. Leland argues that the extended duration of his encounter with the police due to the impoundment of the vehicle was not supported by probable cause because Daro the dog did

[4] The information contained within the four corners of the warrant's supporting affidavits was sufficient to support a finding by the issuing magistrate judge that there existed a "fair probability" that evidence of a crime would be found in the Crown Victoria. United States v. Vega-Figueroa, 234 F.3d 744, 755 (1st Cir. 2000). The affidavits provided ample evidence for such a finding, relating all of the information pertaining to the tips, the pen register, the curious detailing of the vehicle, the dog alert and the alleged incriminating statement at the garage in Newport. Thus, a direct challenge to the magistrate judge's finding of probable cause to search based on the affidavits would not be fruitful.

not, in fact, alert on the Crown Victoria.[5] (Docket No. 43 at 5, § III.) If his rights had not been so violated, he reasons, then he and his companions would have been able to drive the vehicle away and neither the alleged garage statement nor the drugs could have been obtained, making them both the excludable fruit of a Fourth Amendment violation. In order to support this aspect of the motion, Leland wants an evidentiary hearing at which he might present evidence disputing Trooper Carr's sworn statement that Daro alerted on the vehicle, recognizing that if Daro alerted, as attested to by Trooper Carr, there would exist more than ample probable cause to seize or search the vehicle.[6] The proffer Leland makes, as with the other aspects of his motion to suppress, is supported exclusively by an affidavit from his counsel.[7] According to Leland's counsel, "upon information and belief," the dog "did not hit upon the front of the vehicle or anywhere else." (Docket No. 56, ¶ 3.) Although the government has provided sufficient evidence from which the Court might find that Daro did alert and, therefore, that probable cause did exist to seize the Crown Victoria, it has made no argument that probable cause would have existed in the absence of the dog alert. Thus, whether Daro alerted is directly material to the

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[5] For this argument, Leland relies on United States v. Place, 462 U.S. 696 (1983), in which the Supreme Court held that, although the government may temporarily dispossess a person of personal property or "effects" for purposes of administering a dog sniff drug detection test, the government's 90 minute detention of the defendant's luggage while it brought the luggage into the presence of a drug detection dog, unreasonably infringed upon a defendant's "liberty interest in proceeding with his itinerary" because the available evidence supported only a finding of reasonable suspicion, not probable cause. Id. at 708-10. The government observes, quite correctly, that the facts of this case are different from those in Place because the dog sniff test was performed shortly after the Crown Victoria was stopped. But this misses the bigger point, which is whether the officers would have been justified in seizing the Crown Victoria had Daro not alerted to the presence of drugs in the vehicle.

[6] See Carroll v. United States, 267 U.S. 132, 152 (1925) ("For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."); California v. Acevedo, 500 U.S. 565, 570 (1991) ("Following Chambers [v. Maroney, 399 U.S. 42 (1970),] if the police have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle.").

[7] In his initial motion, Leland observed that the officers' affidavits revealed that Leland disputed whether the dog had alerted. But an officer's indication that the defendant disputed a fact is not itself admissible evidence of that fact.

resolution of this aspect of the motion and the Court must determine whether Leland has made a sufficient showing for the Court to convene an evidentiary hearing.

As the government points out in its opposition to the request for an evidentiary hearing, the First Circuit Court of Appeals has made it clear that the district court has considerable discretion in deciding whether to hold an evidentiary hearing on a motion to suppress.

> "[A] criminal defendant has no absolute or presumptive right to insist that the district court take testimony on every motion." United States v. Panitz, 907 F.2d 1267, 1273 (1st Cir. 1990) (citations omitted). Evidentiary hearings on motions to suppress are required only when a defendant makes a sufficient showing . . . . United States v. Migely, 596 F.2d 511, 513 (1st Cir.), cert. denied, 442 U.S. 943, 61 L. Ed. 2d 313, 99 S. Ct. 2887 (1979). To make this showing "the defendant must allege facts, 'sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented.'" Id. (quoting Cohen v. United States, 378 F.2d 751, 761 (9th Cir.), cert. denied, 389 U.S. 897, 19 L. Ed. 2d 215, 88 S. Ct. 217 (1967). The defendant must allege facts that, if proven, would entitle him to relief. Migely, 596 F.2d at 513.

United States v. Lewis, 40 F.3d 1325, 1332 (1st Cir. 1994). In Lewis, the Court of Appeals affirmed a decision by the District Court for the District of Massachusetts to deny a defendant an evidentiary hearing on a motion to suppress where the only evidence submitted in support of the request was an affidavit of counsel, "who had no first-hand knowledge of the relevant events," and which affidavit "contain[ed] only conclusory allegations," whereas the government had "filed detailed affidavits." Id. It is not clear from the Lewis opinion whether the Court of Appeals would have so ruled based merely on the fact that counsel had submitted an affidavit made upon information and belief, because the affidavit was doubly deficient in containing only conclusory averments. In the past courts have ruled that a court appropriately denies an evidentiary hearing when the necessary evidentiary proffer is supported by nothing more than an affidavit of counsel made without personal knowledge. See, e.g., United States v. Gillette, 383

F.2d 843, 848-49 (2d Cir. 1967).[8] I do not need to go so far in denying this evidentiary hearing. Counsel's affidavit, assuming an information and belief affidavit of counsel could carry the day, fails to spell out anything but a conclusory averment.

On balance, I consider Leland's showing to be inadequate in light of Lewis because it is based exclusively on the testimony of a non-witness and entirely conclusory in nature. If Lewis stands for anything, it is that a court appropriately denies an evidentiary hearing on a motion to suppress when the defendant fails to support his motion with an evidentiary proffer of facts that, if credited, would entitle him to relief. Because Leland fails to present testimony that relates the actual facts and circumstances of the dog sniff test, rather than an unsubstantiated conclusion that the test was negative, I deny his request for an evidentiary hearing. Because the available record supports the finding that Daro twice alerted to the presence of drugs in the Crown Victoria's grille area, the officers had probable cause to seize and hold the Crown Victoria until the probable cause issue was determined by a magistrate judge or to seize and transport the Crown Victoria to a location where a warrantless search might have been conducted.

Conclusion

Because there is absolutely no basis in the government's proof to support a finding that Leland ever even made an incriminating statement in Agent Carr's cruiser, let alone that it was voluntarily made, I **RECOMMEND** that the Court grant in part Leland's motion to suppress by suppressing that one statement. However, because Leland fails to present a factual basis for finding as a matter of law (1) that the officers lacked reasonable suspicion to stop the Crown

[8] If Leland's challenge were directed to the probable cause finding implicit in the search warrant, i.e., if he were seeking to go behind the four corners of Trooper Carr's affidavit to attack the Trooper's veracity, as opposed to challenging the officer's justification for seizing the vehicle without a warrant, it is clear that he would be required to put forth affidavits made upon personal information. United States v. Spinosa, 982 F.2d 620, 626-27 (1st Cir. 1992) (citing Franks v. Delaware, 438 U.S. 154, 171-72 (1978)).

Victoria, a reasonable basis for conducting a high-risk traffic stop, or probable cause to seize the Crown Victoria and (2) that the search warrant affidavits were inadequate to support the issuance of the warrants to search the Crown Victoria and Leland's residence, I **DENY** Leland's request for an evidentiary hearing. Because the available record resolves all of those factual questions in favor of the government, I finally **RECOMMEND** that the Court **DENY** Leland's motion to suppress with respect to the drugs and the statement allegedly made by Leland at the garage in Newport.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

October 22, 2003

/s/ Margaret J. Kravchuk
United States Magistrate Judge

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 1:03-cr-00033-JAW-1
Internal Use Only

Case title: USA v. LELAND
Other court case number(s): None **Date Filed:** 05/06/03
Magistrate judge case number(s): 1:03-mj-00017-MJK

Assigned to: JUDGE JOHN A. WOODCOCK JR
Referred to:

Defendant(s)

WILLIAM LELAND (1)

represented by **CHRISTOPHER R. LARGAY**
293 STATE STREET
SUITE ONE
BANGOR, ME 04401
(207) 947-4529
Email: chris@largaylaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE (Conspiracy to Distribute Controlled Substances in violation of 21:846 and 841(a)(1))
(1s)

21:841A=CD.F - CONSPIRACY TO DISTRIBUTE CONTROLLED SUBSTANCES - 21:841(a)(1); 846
(1ss-3ss)

CONTROLLED SUBSTANCE - SELL, DISTRIBUTE, OR DISPENSE (Possession with Intent to Distribute Methamphetamine and Aiding and Abetting in violation of 21:841(a)(1) and 18:2)
(2s)

CONTROLLED SUBSTANCE - SELL, DISTRIBUTE, OR DISPENSE (Possession with Intent to Distribute 500 Grams or More of Methamphetamine and Aiding and Abetting in violation of 21:841(a)(1) and 18:2)
(3s)

UNLAWFUL TRANSPORT OF FIREARMS, ETC. (Felon in Possession of a Firearm in violation of 18:922(g)(1) and 924(a)(2))
(4s)

Disposition

21:841A=CD.F POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE - 21:841(a)(1)
(4ss)

CRIMINAL FORFEITURES
(5s)

21:841A=ND.F - POSSESSION WITH INTENT TO DISTRIBUTE COCAINE - 21:841(a)(1)
(6ss)

21:841A=CD.F POSSESSION WITH INTENT TO DISTRIBUTE OXYCODONE - 21:841(A)(1)
(8ss)

21:841A=CD.F POSSESSION WITH INTENT TO DISTRIBURTE AT LEAST 500 GRAMS OF METHAMPHETAMINE - 21:841(a)(1)
(10ss)

18:922G.F - FELON IN POSSESSION OF FIREARM - 18:922(g)(1) and 924(a)(2)
(14ss)

21:853.F - CRIMINAL FORFEITURES - 21:853(a)
(15ss)

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
21:841A=CD.M; INTENT TO DISTRIBUTE 500 GRAMS OR MORE OF METHAMPHETAMINE; 21:841(a)(1); 18:2 (1)	
21:853.F; CRIMINAL	

FORFEITURE OF A 1996 FORD CROWN VICTORIA SEDAN; 21:853(a) (2)

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
21:841A=CD.F: Distribution of Methamphetamine	

Plaintiff

USA represented by **DANIEL J. PERRY**
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344
Email: dan.perry@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED